IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

THURSDAY, THE 23RD AUGUST 2007 / 1ST BHADRA 1929

AS.No. 616 of 1999(D)

AS.66/1997 of DISTRICT COURT, ALAPPUZHA

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APPELLANT:

NARAYANA PILLAI PRABHAKARAN PILLAI, PUTHENPURACKAL FROM KIZHAKKEDATH, AROOR MUIRI, AROOR VILLAGE

BY ADV. DR.P.S.KRISHNA PILLAI
SRI. ROY CHACKO

RESPONDENTS:

1.AMUUKUTTY AMMA W/O RAMAN PILLAI, THOPPIL VELIYIL ARROR MURI, AROOR VILLAGE

2. VELAYUDHAN PILLAI, RAMAN PILLAI, THOPPU VELIYIL AROOR MURI, AROOR VILLAGE

3. PADMANABHAPILLAI ARAVINDAKSHAN PILLAI THOPPIL VEEDU -DO- -DO-

4. PADMANABHA PILLAI SASIDHARAN PILLAI, -DO- -DO-

5. KARTHIYAYANI AMMA PADMAVATHY AMMA -DO- -DO-

6. KAMALA ARAVINDAN PILLAI -DO -DO-

7. RAMAN PILLAI GIRIJA VALLABHAN PILLAI ALIAS INNU, -DO- -DO-

8. RAMAN PILLAI RADHAKRISHNAN ALIAS RAJU -DO- -DO-

9. RAMAN PILLAI MOHANDAS ALIAS KUNJICKAN, -DO- -DO-

10. BHANUVIKRAMAN PILLAI ALIAS VIKRAMAN -DO- -DO-

11. AMMUKUTTY AMMA PUSHPAVALLY, D/O RAMAN PILLAI -DO- -DO-

12. RAMAN PILLAI ASHOK KUMAR ALIAS ASHOKAN , -DO- -DO-

13. AMMUKUTTY AMMA USHA -DO- -DO-

14. AMMUKUTTY AMMA SOBHANA, THOPPIL VELIYIL, AROOR MURI, AROOR VILLAGE

15. RAMAN PILLAI CHANDRAHASAN ALIAS SHIBU, THOPPIL VELIYIL, -DO- -DO-

16. KARTHIYAYANI AMMA RETNAMMA, PUTHENPURAKKAL, PALLIPPURAM MURI AND VILLAGE

17. PADMANABHA PILLAI RAMACHANDRAN PILLAI, THOPPIL AROOR MURI, AROOR VILLAGE.

18. PADMANABHA PILLAI RAVINDRAN PILLAI -DO -DO-

BY ADV. SRI.P.G.PARAMESWARA PANICKER (SR.)
SRI.P.GOPAL
SRI.GOVIND K.BHARATHAN
SMT.M.HEMALATHA

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON 23/08/2007, ALONG WITH LAA NO. 849 OF 1997 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.PADMANABHAN NAIR, J.

A.S.No. 616 of 1999

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L.A.A No. 849 of 1997

Dated this the 23rd day of August 2007

JUDGMENT

1. The plaintiff in O.S. No. 154 of 1974 before the court of the Sub-judge Alappuzha is the appellant in these suits. challenging the decree and judgment passed by the Court below dismissing the suit for declaration of title, possession and injunction. This is a litigation which is celebrating its silver jubilee. Initially the suit was filed a O.S. 275/1972 before Munsiff Court Cherthala. It was transferred to the Subordinate Judge's Court of Alappuzha for joint trial with L.A.R. No. 152 of 1972. The suit was renumebred there as O.S. No. 154 of 1974.

2. The plaint schedule property originally belonged to Kizhakkedathu tarawad which had a number of branches. It is also to be noted that the parties to the suit are 'pattaryas' governed by the prestine marumakkathayam law. There was no right for partition of properties to the tharwad for the members of the Community.

3. A.S. 616/1999 was filed according tot he plaintiff since he got information that the 1st defendant who was residing in the property on the western side of the plaint scheldule property was attempting to trespass into plaint schedule property and that defendants 2 and 3 who were residing in the property on the northern side was intending to shift their

fence further south thus reducing plaintiff's portion of the plaint schedule property. An area of 3.62 ares out of the property was acquired for widening the National Highway on the eastern side of the property. The 1st defendant claimed the compensation. The dispute is referred tot he Sub-Court Alappuha and the amount of compensation is deposited in the court. After the 1971 agreement the plaintiff had shifted two kudikidappukars who were residing in the property. Defendants 2 and 3 are persons residing in the northern property of the plaint schedule property. There was a fence in between these properties. Defendants 2 and 3 are attempting to move the fence further south by trespassing into the property of the plaintiffs.

4. The case put forward by the plaintiff was that the plaintiff and the 1st defendant are members of common marumakkathayam tharwad by namely Kizhakkedeth tharwad till the demolishion of the joint family system. It is averred that the plaintiff is the present eldest male member of the Puthenpurackal sakha of the tharwad and the 1st defendant is a member of Thoppil sakha. It was averred that the plaint schedule properties having an extent of 2 acres and 33 cents comprised in survey Nos 43/1 A, B, C, D, E, F, G and H, and the properties lying contiguously and was given to Puthen purakkal sakha for the meintenance of members of that sakha. It was averred that about the year 1065 M.E. the karanavan Govindan Narayanan entrusted the property with others for effecting improvements and the plaintiff's karanavan Kochunarayana Pillai got release of the rights of two of such persons by Exhibit A1 dated 12-11-1103 ME and Exhibit A2 dated 22-

09-1103 ME. The right for improvements effected by one Kunjan and his wife Lakshmi was got assigned as per Exhibit A3 dated 03-06-1967 in the name of wife of Kochu Narayana Pillai. Kochu Narayana Pillai was stated to be in possession till his death. The plaintiff and three others had filed O.S. No. 6 of 1967 for maintenance. Kochu Narayana Pillai who was the then karanavan of the sakha was the 1st defendant in the suit. Pending the suit Kochu Narayana Pillai died. The 1st plaintiff in O.S. No. 6 of 1967 who is the plaintiff in the present suit was the next karanavan. He was transposed as 13th defendant in O.S. No. 6 of 1967. The suit was decreed and the present plaintiff who was transposed as 13th defendant was directed to pay maintenance to plaintiffs 2 to 4 from the date of his becoming karanavan. Exhibit A5 dated 31-03-1971 is the decree . The 2 acres and 33 Cents was shown as B schedule item 4 in the plaint in O.S. No. 6 of 1967.

5. Subsequently Exhibit A4 partition deed dated 11-04-1971 was entered into by the plaintiff and others. The 2 acres and 33 cents in Survey No.43/1A, B, C, D, E, F, G and H were allotted to the plaintiff in Schedule A to Ext.A4 partition deed. Executants 1 to 7 in Exhibit A4 were members of plaintiffs' sakha, defendants 8 to 14 legal heirs of deceased Kochu Narayanan Pillai who was 1st defendant in O.S. No. 6 of 1967. Executants 15 to 17 were legal heirs of another deceased member of the sakha,Krishna Pillai . The suit was filed on 24-03-1972 alleging that defendants were intending to trespass.

6. 1st defendant filed written statement. It is also averred that the 1st defendant is the paternal uncle of the Chellappan Pillai. It was averred that after the death of karanavan his son Chellappan pillai was in possession of the suit properties for sometime. For some time chellappam pilai had to surrendered the property to the plaintiff . Chellappan Pillai was enemical terms towards the plaintiff and the 1st defendant had instigated his paternal uncle to trespass into the property . It is also averred that 3.62 ares of land was acquired for the widening of the National Highway and the award amount is deposited in the Subcourt of Alappuzha. . It was contended that the 1st defendant have no right or possession over the property and there are two Kudikidappukaran in the property and after getting the allotment of the property in the year 1971 by way of the partition deed, the plaintiff had given alternate site to the one Kudikidappukaran and attempts are making to shift the other kudikidappukaran. It was further averred that defendants 2 &3 are residing in the property situated on the north of the suit property There is fence which is constructed east- west and the defendants 2&3 are trying to remove that fence and to establish it more southwards to acquire Some portion of the plaint schedule property more. Hence his prayer for declaration of title possession and consequential injunction. It was also contended that the plaintiff has no title or possession over the plaint schedule property. Kizhakkedathu Kudumbom was divided into 4 thavazhies and the 4 thavazhies are separately in possession of the properties for their maintenance. The

properties including the plaint schedule property comprised in Sy.No. 43/1 was set apart to Narayanan Govindan who is a member of the Sakha of Ichira. On 12th Edavam 1094 as per document No.2444 the aforesaid Narayanan Govindan had executed a settlement deed in favour of the 1st defendant with respect to the plaint schedule property and other properties. The averment in the plaint that in 1065 govindan Narayanan had given the property for improvements is not correct. Prior to 1094 the property was in the possession of Govindan Narayanan and subsequently in the possession of the 1st defendant. Kunjan had no improvement right in the property. The surrender deeds of 1103 are fraudulent documents and they will not bind the 1st defendant or the properties. Velu or his wife Lakshmi had no improvement right in the property. The surrender document by them also is fraudulent. Neither Kochunarayana pillai nor his son Chellappan Pillai was in possession of the property. The plaint schedule property is not included in O.S. of 1967 of Sub-court Alappuzha. The udampady alleged to have been brought about subsequent to the suit will not bind the 1st defendant or the properties. Plaintiff had not obtained any right under the udampady. The 2nd defendant is in possession of 49 Cents on the north of the plaint schedule property on nadappupanayam given by the 1st defendant. The compensation awarded in the Land Acquisition case is passed in favour of the 1st defendant but since the plaintiff had raised claim to the amount, the amount is deposited in the Sub court Alappuzha. Plaintiff has no right to shift the Kudikidappu from the plaint schedule property. The

kudikisappukars shifted from the property after obtaining the amount from the 1st defendant. The fence in between the property of the 1st defendant and the 2nd defendant is not a boundary fence. The plaintiff is not entitled to question the construction of the fence by the 2nd defendant. The extent shown in the plaint from the property is not correct. The suit is bared by resjudicata . The plaintiff's relief for injunction is also denied. 1st defendant also contended that defendants 4 to 11 had trespassed into the property at the instigationof the 1st defendant is false. The 2nd defendant had only shifted the fence to the southern boundary of the property held by him under panayam. The extent of the property given to the 2nd defendant on panayam is 39 cents and not 49 cents as stated in the original written statement. The 4th defendant had constructed a house in the plaint schdule property for his own use. 5th defendant is the brother of the 4th defendant. 7th defendant is the wife of the 4th defendant. They are also residing with the 4th defendant. 6th defendant had not constructed any house. The house cannot be demolished.

7. The 2nd defendant filed written statement denying the right of the plaintiff over G. and H in Sy.No. 43/1 It is also contended that the 1st defendant had given the property on Pattom to Kavamma Lakshmi Amma in 1114. The pattom right of Lakshmi Amma was got assigned by Sankara Pillai Narayana Pillai in 1124 on 13th Thulam 1124 a panayam right was also

obtained over the property and a house was constructed. On 1st October 1952 on behalf of the children of the 2nd defendant their Karanavan and brother of the 2nd defendant Krishna Pillai Kumara Pillai obtained the right and the 2nd defendant and the children are in possession of the properties. The 1st defendant is the eldest member of Kizhakkedathu kudumbom, Chellappan Pillai was never in possession of Sy.No.43/1 GH. He was not a party to O.S. 6 of 1967 and the property comprised in Sy.No. 43/1 GH was not included in that suit. The partition agreement alleged in the plaint is not binding on this defendant. A portion of the property in their possession was acquired for the National Highway and this defendant is in possession of the balance property. 3rd defendant is not a necessary party to the suit and the plaintiff is not entitled for any relief. The 2nd defendant also contended that the suit is not maintainable. It was contended that the plaintiff have no right or possession over the suit properties. It was also specifically contended that the properties comprised in G & H of Survey Nos 43/1 is absolutely belonged to 1st defendant and he gives the properties to one Lakshmi Amma on lease in the year1114 and subsequently that leasehold right assigned to Kochu Narayana Pillai in the year 1124 and he got mortgages also in the year 1124 and was in possession. It was contended that on 1-10-1951 the 2nd defendant got assignment of the mortgage right and he has in possession and enjoyment of the same. The averment that the plaintiff is the seniormost male member of the Puthen Purakkal Shakha is admitted. But it was contended that he was not the karanavan of the common Thavazhy

and the 1st defendant is the karanavan. of the common thavazhy. The documents under which the plaintiff claimed title was denied. It was contended that none of the documents shows the relation of the properties comprised in Survey No.43/1 G & H, Chellappan Pillai also never in possession in that subdivision of properties. It was contended that in O.S. 6/`1967 the properties in Survey Nos 43/1 G & H not included and even if decree is not binding on the 2nd respondent as he is not a made a party to the suit. It was also contended that the partition deed of 1971 is not binding on the 2nd defendant. The 2nd defendant further contended that the portion of the properties was acquired for the widening of the National Highway and she is entitled to that amount. The averment that they are trying to remove the fence is admitted. The fence was constructed long back to separate the properties of the plaintiff with that of the defendants. and the plaintiff has no right.

8. Intially there were only three defendants. Subsequently additional defendants are impleaded.The averments were also amended. The suit was amened for declaration of title and recovery of possession. The relief portion was also amended It was also contended by the plaintiff that even though there was an order of injunction the defendants 4 to 12 shifted the fence. It was on the northern side so as to include a portion of the suit property and the taking advantage of the fact that the Kudikidappukaran had shifted from the property defendants 4 to 7 had trespassed into that area and constructed a building and residing there. It

was contended that the fence was constructed during the pendency of the suit. Fence and structures were constructed by the defendants and the defendants has no right or authority to do so. So the fence is to be removed and also the building is to be demolished.

9. Defendant 4 to 7 in the written statement contended that the suit is not maintainable. Plaint schedule property is in the possession of the 1st defendant. 4th defendant is residing in the house in the property constructed by him. His wife the 7th defendant and his brother 5th defendant are also residing with him. One of the house is meant for storing fire wood and in the other they are residing. Plaintiff is not entitled for demolishion of the house. 6th defendant is not residing in the plaint schedule property.

10. Defendants 9,11, 12 in their written statement stated that they adopt the contentions of the 2nd defendant. They denied the allegation that they had changed the position of the fence.

11. On behalf of the minor 13th defendant the court guardian filed written statement adopting the contention of defendants 9 to 12.

.12. The further amendment is that the 1st defendant filed additional written statement reiterating the contention and also denying the allegation and at this instigation the fence of the norther side was shifted Construction of fence and building was denied by defendants 4 to 7. It was

contended that the averment that the extent of mortgaged property was 49 cents is a mistake and the actual extent was on 39 cents. It was contended that the buildings were constructed long back and no trespass was committed after 1972. The defendants 2, 9, 11 filed a joint written statement contending that the suit was not maintainable and they adopted the contention initially raised by the 2nd respondent in the original written statement. The averment that after the filing of the suit they shifted the fences and trespassed into the property was denied. The defendants 4 to 7 filed written statement contending the suit is not maintainable. It was contended that the properties were in the possession of the 1st defendant and the plaintiff had never got any title or possession of the suit properties. It was contended that 4th defendant constructed a building and he is residing in the along with the 7th defendant and his wife and 5th defendant who is his brother. It was contended that the plaintiff has no title to get the relief of demolition of the structures. It was contended the 6th defendant is residing in some other property and she is unnecessarily impleaded in the suit. The court guardian filed written statement on behalf of the minor 13th defendant that suit is not maintainable and adopting all contentions raised by defendants 9 to 12.

13. The suit was dismissed. The plaintiff filed A.S. 307/1984 before this Court. Initially the appeal was filed as A.S. 166/1981 before the District Court Alappuzha. which was withdrawn to this Court and renamed as A.S.

307/1984. to be heard along with along with LAA 388/1981. The trial court dismissed the suit and a consequential award passed in favour of the 1st defendant permitting him to withdraw the suit .

14. The suit and the connected LAR No. 152 of 1972 were disposed of by common judgment dated 31-08-1981. The suit was dismissed and the Land Acquisition Reference was decided in favour of the 1st defendant. The plaintiff filed A.S. No. 166 of 1981 in the District Court of Alappuzha against the dismissal of the suit. He also filed LAA No. 338 of 1981 before this Hon'ble Court against the judgment in LAR No.152 of 1972. The appeal filed in the District Court of Alappuzha was called to this court to be heard along with LAA 338 of 1981. The appeal was numbered as A.S. No.307 of 1984. . The main argument raised in that case was that the sub divisions shown in the survey numbers mentioned in the plaint were not correct and the appellant may be given an opportunity to amend the plaint indicating the correct survey Nos. It is also contended that after finding that the identification of the property made by the Commissioner was not correct, the court below ought to have appointed another commissioner for getting the fresh report and plan.

15. This court though find that there were laches on the part of plaintiff he should be given another opportunity to amend the plaint. So the appeal was allowed on condition that in case the appellant pay a cost of Rs.1,000/- to the counsel for the 4th defendant within a period of 1 month

from the date of judgment, the decree and judgment passed by the court below stand set aside that matter will be remanded to the lower court for fresh disposal in accordance with law and in the light of observations contained in the judgment. He was also held that in case the cost was not paid the appeal will stand dismissed. This court further directed the trial court to depute a fresh Commission to prepare the plan report and giving necessary details to locate properties of the plaintiff and defendants. Appellant directed to bear the cost.

16.; After remand the plaintiff filed I.A. 217/1992 to amend the extent of the plaint schedule property was altered as 1 acre and 12.575 cents in G and H only instead of 1 acre 23 cents in Survey Nos 43/1 A to H. That was allowed. . Before amendment the plaint schedule property was described as One acre and 23 cents. forming part of the plaint schedule of 2 acres and 33 cents comprised in Survey Nos 43/1. A.B,C,D, E, F, G & H. lying contiguously. It was also averred that one acre from the 2 acres and 33 Cents is in the possession of the strangers. and 10 Cents of properties was given by the plaintiff to his brother-in-law. Sridharan Pillai. and the plaint schedule property is situated part of the balance extent of the property of 2acres and 33 cents. after excluding 1 acre and 10 cents. After amendment the extent was further reduced to 1 acre 12.575 Cents and the sub divisions A,B,C,D,E & F. were deleted. But it was asserted that the suit properties are included in the Survey No 43/1 G & H. The allegation that properties 10 cents was given to Sridharan Pillai. and the balance was

1 acre and 12.575 cents is acceptable.. The eastern boundary of the property was stated to the road which is the present National Highway. The properties in the south is described Marakkarau Parambu on the west and north. The properties were described as it was stated as properties belonging to the portion of the same property.

17. After the amendment the defendants 4 and 6 filed additional written statement contending that the amended plaint schedule building is also not clear and it is not possible to identify the property described in the plaint. It was also contended that the property described in the amended plaint is not included in the partition deed 11-11-1971. It was also contended that without identifying the entire A schedule properties included in the partition deed of 1971 the property claimed by the plaintiff cannot be identified. After the remand a commissioner was deputed who filed Ext.C9, C10 & C11 reports and plans. The the proceedings paper also shows that after remand no further oral evidence was adduced. But Exts A16 to A26 were proved and PW6 & PW4 the Commissioner and Surveyor who prepared the Exts C9 to C11. were examined. A16 to A26 were marked on the side of the plaintiff, B19 to B28 were marked on the side of the defendants though, those facts were not noted in the appendix prepared.

18. The trial court again dismissed the suit. Challenging the decree and judgment the plaintiff filed A.S. 66 of 1997 of the District Court Alappuzha against that judgment and was withdrawn to this court and

renumbered here as A.S. No. 616 of 1999 for hearing along with L.A.A. No. 849 of 1997 arising from the judgment in L.A.R. No. 152 of 1972. which was allowed. . The learned counsel appearing for the appellant strenuously argued before me that the trial court dealt with the matter in a most shabbily manner . The learned counsel appearing for the appellant has filed I.A 3026/2005 for amending the appeal memorandum which was already allowed. It is argued that the while remanding this case this court issued a specific direction to the parties as well as the trial court to depute a fresh commission. After giving necessary details to locate the properties of the plaintiff and defendants. It is contended that after the remand the trial court admitted Exts.A16 to A26 and B19to B28. But they were not referred in the judgment. and they are not even included in the appendix. It is also contended that the court below ignored the direction of this court and did not consider whether the commissioner had identified the properties as per the descriptions contained in the documents relied on by the parties before proceeding with the merits of the contentions raised by the appellant. I may also state that even on this 25th year the appellant/ plaintiff wanted this Court to consider certain fresh documents in deciding the matter . The learned counsel appearing for the plaintiff made available the thandaper account of the 1st defendant to contend that these properties were not included in his thandaper account and he was not paying the tax. The documents made available shows that these documents were obtained long back after obtaining the purchase certificate by the plaintiff . No satisfactory

explanation is offered by the plaintiff for non production of the important documents at least even after the remand of the case by this Court. The learned counsel appearing for the appellant submitted that the plaintiff instigated his counsel in the court below to get certified copies of the documents. And on getting such a certified copies of these documents on account of an omission on the part of the advocate clerk they were not produced. Even assuming that these documents are admitted in evidence that will not advance the case of the appellant. This core question arising for consideration in the suit is alone the appellant have proved his title and whether he is entitled to get recovery of the suit property. He is not entitled to get the recovery of the suit property and to get the relief on the ground that of the weakness of the defendants. So I do not find any reason either to admit this document or to impose another remand after the lapse of 25 years. So I do not propose to place any reliance on the document now referred by the counsel for the appellant. Now I shall consider the contention raised by the appellant that he had proved the title. The learned counsel appearing for the appellant strenuously argued before me that the remand for specific purpose and even after remand the properties were not identified. After remand an advocate commission was appointed. He located the property with the help of a head surveyor deputed from the office of the Superintendent of survey and land records. Ext.C9 to C11 is the plans and reports. it is argued that though there was specific direction to measure out the properties as per the direction issued to the

Superintendent of survey and land records to assist the Commissioner, he did not attend the work but deputed a head surveyor attached to the office of the Superintendent who was assisted the Commissioner in preparing Ext.C11 plan. The learned counsel appearing for the appellant invited my attention to argue that there are material contradictions in the evidences of PW3 andPW4 and it will show that the Commissioner did not make any attempt to comply with the direction issued by the Sub court. But he prepared a plan as demanded by the 1st defendant. It is also argued that the evidence of PWs 3 & 4 contradicts each other. It was pointed out that PW3 advocate commissioner had admitted that he does not know the designation of the person who conducted the survey. But he had admitted that he has no authorisation letter from the Superintendent of Survey and Land records to conduct the actual measurements. It was also pointed out that PW3 has admitted that the details and measurements were conducted in the absence of the plaintiff but the defendants alone were present. It is also pointed out that the Commissioner's evidence will show that he does not know the distinction of the survey stones. It is also argued that his evidence will show that he did not bother to identify whether the stone fixed as the boundary of the surveyed property by the surveyor is correct or not. It is also argued that in the mahazar prepared by the advocate commissioner he had noted that the defendants are residing in the disputed property and that was a mistake. It was contended that Commissioner had admitted that the endorsement made by the Commissioner that the property

of the 1st defendant was taken by late. Sri Sridharan Kartha who was appointed as the receiver initially and that part of his report was not correct and proper. It was also contended that PW4 the surveyor was not the Superintendent of Survey. He was only a District head surveyor and the Superintendent of Survey is the superior officer. He deposed that the Commissioner has shown some documents. But he does not remember those documents. It is also pointed out that in the plan he had noted that the property shown as the suit properties in the possession of the 1st defendant That is because of instigation given by the Commissioner. But he had not seen the documents Ext .B8 under which the 1st defendant claims. in short the thrust of the argument is that Ext.C9 to C11 are to be set aside and the case again to be remanded for proper identification It is pointed out that after remand the plaintiff produced Ext.A22 which along with the documents will conclusively show that the property of the four boundaries can be identified properly The learned counsel appearing for the respondents has argued that the main question to be considered is whether the Commissioner is able to identify the same property. The main question to be considered whether there is any material to prove that the plaintiff had any semblance of right over the properties to be proved. It is argued that the surveyor was examined. 2 acres 33 cents or any portion thereof. It is argued that the commissioner filed Exts C9 C10.and C11. The matter was elaborately heard by the trial court and passed order dated 11-10-1995. The trial court remitted the Exts C9 to C11 for the purpose of showing the

properties which according to the plaintiff that he gives to his brother in law. That was also marked. It is contended that all the contention raised by the plaintiff were properly considered by the trial court, So there was no need to consider that the aspect again in the final judgment. It was also argued that the Exts C10 and C11 were filed as early as 29-11-1992. PW3 and PW4 were examined on 25-7-1994 Even if the surveyor made some mistake that cannot be a ground to set aside Ext C9 to C11 and remand the matter again. It is argued that, the mere fact that the Superintendent of Survey and land records himself did not attend the work is not a ground to set aside . It is argued that on an early occasion another Superintendent of Survey was measured the property to assist the commissioner . Ext.C4 was measured by the Superitnendent of District Survery and land records Alleppey. Infact Exts C8 plan was prepared by PW5 Balakrishnana Pillai who was also the District Superintendent of Survey and land records Alleppey. It is true that in spite of those reports this court directed to depute a fresh Commissioner . So I am of the view that it is to be considered whether the plaintiffs were able to establish any right over the 2 acres and 33 Cents or any portion of the same.

19. As I already stated initially the suit property was described as one acre and 23 Cents. It is 2 acres and 33 Cents. It was stated that the total extent of 2 acre and 33 cents comprised in Survey Nos. 43/1 A to H The description gives an impression that all the properties lying contiguously . It is submitted that one acre of property in the possession of

the strangers How that property comes in the possession of the strangers and what is the stage of that property in which they are in possession etc are not stated. It is also pointed out by the learned counsel for the respondent that the partition deed was executed on 11-11-1971 and registered on 12-11-1971. The suit was filed on 24-3-1972. It is also to be noted that after the execution of the partition deed the plaintiff executed Ext.B1 exchange deed dated 22-2-1972 and that suit was filed on 24-3-1972. Neither in the partition deed or in Ext.B1 exchange deed there was no reference of any property in the possession of strangers. It was come out in evidence that the properties comprised Sub division No. F in survey No 43/1 is Government land The Exts. C11 plan shows that the extent of the various sub divisions are as follows 43/1 A is 11 Cents, Bis having an area of one cent, C is having an area of 14 Cents D is having 54 Cents and E is having an area of 14 Cents and F which is lying on the north of E is having an area of 9 Cents and the same is Government land. G is situated on the eastern side of ABCDEF. It is having an extent of 8.17 Cents. H is having which lies on the east of G having an area of 54 Cents The evidence on record shows that at present the total extent available for all these survey Nos, is only 9.74, There is a shortage of 59 cents what the Commissioners have done isthat they have made proportional deduction for the purpose of preparing plan and report. The same cannot be proved. But still the question arising for consideration is that how far the plaintiff has proved this possession The documentary evidence shows that

the total area is having almost 9.74 cents and each subdivisions A to E are lying on the north south position of F is on the north side of G an d H on. So it is virtually impossible for a compact plot having an area of 2 acres and 33 Cents of property from all these survey Numbers. Any way after the remand of the case from this court the plaintiff deleting the survey numbers A to F and limited his claim only to G and H. Even in G sub division is having more than 8.76 acres of property. The plaintiff is claiming only 76 cents and the remaining property in G. G schedule was actually 76 cents was not discernible from any of the records produced in this case. I have considered the title addressed by the plaintiff admittedly the properties originally belong to Kizhakkedathu tharavad the main tharwad as got four branches. The plaintiff is a member of puthen Purakkal Sakha and the 1st defendant is the member of Thoppil shakha, It is admitted by the plaintiff that there was a karanavan for the common thavazhy by name Govindan Narayanan . one stage the pllaintiff had stated that the property was given to strangers by the common karanavan of tharavad and they were in possession. Subsequently one Kochu Narayanan Pillai who was the karanavan of Puthen Purakkal Sakha got the properties released and he was in enjoyment as properties until his death and after his death his son was in possession till 1971 and after the execution of the partition deed Chellappan Pillai has surrendered possession to the plaintiff. This is denied by the 1st defendant. It was contended that the name of the common karanavan stated was not correct. It is also contended that the property was

given to Thoppil sakha and from the year 1094 onwards. The 1st defendant was in possession and enjoyment of the properties. It is also contended that Ext A1 to 3 are not in respect of any land at all and it is in respect of some members. The recitals in Ext. A1 shows that the property was in the possession of one Kochu Narayana Pillai and certain members standing in the property were persons who executed the document. In short by executing the document He had released and assigned his right over those members alone. The description of the property shows that it consists of 23 jack tree saplings other trees. No land is conveyed. Same is the case in which A2 and A3 also. It is also to be noted that under Ext A3 actually the properties purportedly to have been released in favour of the wife of Kochu Narayanan Pilllai and the subject matter of the document is only 7 trees. The next document relied on by the plaintiff is the . decree passed in O.S. 6/67. O.S. 6/67 was filed by the plaintiff . The 1st defendant in the suit was Kochu Narayaana Pillai. But according to the plaintiff Kochu Narayanan Pillay was the Karanavan of the Branch A perusal of the decree shows that, A schedule items 1 and 2 were in the possession of plaintiff's thavazhi were more than sufficient for the maintenance of plaintiffs. It was held that in the nature of the suit, it was not necessary to consider whether A schedule items 3 and 4 and B schedule items were tarwad properties or not or for considering the prayer for realisation of maintenance till death of the 1st defendant, Kochu Narayana Pillai. There was no dispute between plaintiffs 2 and 4 and the 13the defendant who was the original 1st

plaintiff. It was he, who was examined on behalf of the plintiff. Plaintiffs 2 to 4 were given decree to realise maintenance at the rate of Rs. 833.31 (Rs.277.77 for each plaintiff) from the 13th defendant from the date of his becoming Karanavan oon the death of Kochu Narayanan Pillai and A schedule items 1 and 2 also came to his possession as karanavan. In other respects the suit was dismissed. No claim can be founded on Exhibit A5 decree in O.S. 6 of 1967 in which there is no adjudication of any sort as regards B schedule item 4 therein and to which the 1st defendant was not a party.

20. The next document relied is Ext.A4. partition deed. It is trite law that a title cannot be created by inclusion in a partition deed and allotment of the same to an executant. The family or the executants should have pre-existing title for inclusion in the partition deed. No such pre-existing title is proved in the case. Admittedly a reading of the partition deed will show that the plaintiff in the present suit claimed titled and possession under Ext. A1 to A4 documents

21. There is yet another aspect except the 1st defendant in A.S. 616/1999 was the 3rd defendant in O.S. No. 18 of 1116. There was no allotment for maintenance to Puthenpurakal sakha is clear from the records relating to O.S> No. 18 of 1116 of Alappuzha District Court, subsequently transferred to the Sub Court,Alappuzha and re-numbered there as O.S. No.77 of 1962. O.S. No.18 of 1116 was filed by a member of Kizhakkedathu tarwad for maintenance. All members of the tarwad were made parties to

the suit and all properties of the Kizhakkedathu included in that suit. Ext.B3 is the plaint in O.S. 18 of 1116 Ext.B7 is the written statement filed by the 1st defendant. Ext.12 is the settlement deed dated 12-10-1094 ME. Ext.B8 is the present suit. Ext.A8 is the written statement filed by the 6th defendant. Ext.B4 is the judgment dated 25-01-1963. Ext.B5 is the judgment of A.S. No. 408 of 1968. dated 30/1964. Ext.B6 is the decree in S.A> No. 575 of 1965 dated 26.03.1970 Ext.B7 is the written statement filed by the 3rd defendant. in that suit was the sub division Nos A to E and G and H to Sub division F was not included in that for the obvious reason that it is Government land.

22. A reading of Ext.B7 shows that the properties had been allotted to different sakha from very early times and each sakha was in separate possession of the properties allotted to it. Items 5 to 26 had been allotted to Narayanan Govindan had executed settlement deed dated 12-11-1094 ME in favour of the 3rd defendant in respect of items 5 to26. After the settlement deed the 3rd defendant was in possession. No other person has any right. The contention raised by the Kochu Narayana Pillai in his written statement that portions of items 8 to 13 are in his possession on improvement right is not true. His case of obtaining assignment from Itty and others is not correct. The entire property is in his possession and assignment. If Kochu Narayana Pillai has created any false documents, it will not affect the 3rd defendant's right. Item 26 is a building which was directed to be taken delivery of after evicting one Anthukkai. This building

was taken delivery of as recited in the settlement deed dated 12-11-1094. After the settlement deed 4 buildings were constructed in Thoppilparambu purayidom taken by the settlement deed. Items 5 to 26 were improved and plantations made by the 3rd defendant spending substantial amounts.

23. The evidence on record shows that Kochu Narayana assigned is independent right over the properties as per Ext.A8 in that suit . The interse dispute between Kochu Narayanan the 1st defendant was left open in appropriate proceedings. So it is evidently clear that this property was never considered as property in the possession of plaintiff of puthen purakkal sakha for maintenance as per the evidence of A1 to A4. It is not at all possible to hold that the plaintiff sakha got these properties at no point of time from main tharwad. So there is absolutely no evidence to hold that the plaintiff has got got title and possession that the suit properties described in the plaint. There is yet another aspect. All the commissioners and receivers deputed in this case were unanimous in stating that the suit properties could not be identified with these documents. So by deputing another commissioner and surveyor the position will not improve at all. It is true that the learned subordinate judge had not discussed the matter as expected in the trial court but remanding the matter for a futile to attempt to get another plan and report It is belong to the sub- judge to write another judgment in view of the facts stated above.

24. So I do no find any reason to remand a 25 years old suit and reopen a litigation again. So there are some infirmities in evidences of PW3

and PW4. I also opine that it is not worthwhile is setting aside the decree and judgments and remand the case for a fresh disposal So the plaintiff is failed to prove his title. The plaintiff is proceeded with the title of the sakha. Hence the dismissal of the suit by the trial court is perfectly justified. I confirm the same. It is submitted by the plaintiff that some of the documents produced after the remand will be helpful for identifying the property. He mainly relied on Ext A22 and argued that the description of the 10 documents produced after the remand will show that the property can be easily identified. It is argued that these documents will disprove the rival title supported by the defendants . It is true that the trial court has not considered Ext.A16 to A26. But those documents will only help to identify the boundaries of the entire properties and not the plot now claimed by the plaintiff. As I already stated plaintiff had approached the court for a declaration of title and recovery of possession., He cannot take advantage of any defect in the title of the defendants. He has to win or lost beyond the strength of the case and on the weakness of the opposite side.

25. In the result the appeal is dismissed. In view of my finding in A.S. 616/1999 the LAA is also to be dismissed.

26. In the result, A.S.No. 616 of 1999 and L.A.A No. 849 of 1997 is dismissed.

K.PADMANABHAN NAIR, JUDGE

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